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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends (1) that a government informant should have been produced or identified prior to trial; (2) that a government witness improperly alluded to petitioner's prior police record; (3) that the district court should have allowed petitioner to introduce evidence to impeach an informant; and (4) that the court's instructions to the jury relating to the testimony of accomplices and informants was insufficient.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of conspiracy to distribute heroin, in violation of 21 U.S.C. 846, and on three counts of distributing heroin, in violation of 18 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment on each count, the sentences to run consecutively, and to a special parole term of three years. The court of appeals affirmed without opinion (Pet. App.).

On January 17, 1973, Leonard Martin, a former heroin addict who was acting as a government informant, and Agent Earlie Hughes, working under the auspices of the Drug Enforcement Administration, Department of Justice ("DEA"), were on patrol in an unmarked car. When they saw petitioner they stopped, and Martin got out and asked petitioner if he knew where Martin could obtain heroin. Petitioner responded affirmatively and asked how much money Martin wished to spend (Tr. 171-173). Martin replied that he had $700. Petitioner told Martin to get the money and call him at a private number listed in his wife's name (Tr. 90-91, 174, 232). When Martin called petitioner a meeting was arranged for later in the day at a bar owned by petitioner (Tr. 179-180). Petitioner also discussed the quantity of heroin to be involved in the transaction (Tr. 180).

Martin and Agent Hughes thereafter drove to the bar and waited in the car for petitioner. When petitioner arrived he and Martin went into an alley adjacent to the bar where petitioner explained that he did not want to effect the transaction in front of Hughes. Martin then returned to Agent Hughes, obtained $350 from him, and gave it to petitioner (Tr. 193-194, 241-242).

Petitioner and Martin drove away from the bar with Agent Hughes following at a distance, as had been agreed. Petitioner then drove to a garage where a package of heroin had been concealed, retrieved it, and gave it to Martin, who in turn subsequently gave it to Agent Hughes (Tr. 196-198, 244).

During the summer of 1973, undercover narcotics agents arranged to make a series of heroin purchases from Daniel Mayoral.[1] Petitioner, in turn, supplied Mayoral with the heroin.

On July 23, 1973, Officer Peter Menkiewicz, working under the auspices of the DEA, arranged to purchase heroin from Mayoral (Tr. 255-256). Accompanied by the informant James Pickring, who introduced him to Mayoral, he went to Mayoral's house on the same day (Tr. 257). Mayoral told him that he did not have any heroin and that they would have to wait for him to contact his supplier (Tr. 263). Mayoral then telephoned petitioner and arranged to obtain heroin (Tr. 263, 268, 364). He then told his wife to make out a check for $100 payable to petitioner, and also asked Menkiewicz for $200 (Tr. 268-270).

Mayoral left and drove to petitioner's house (Tr. 306). **There he gave the money to petitioner, who told him that he could pick up the heroin at petitioner's bar,** which **Mayoral did (Tr. 306-308, 365). Mayoral then returned to his own house and completed the transaction with Officer** Menkiewicz (Tr. 273).

On August 10, 1973, Officer Menkiewicz and Mayoral arranged another heroin purchase (Tr. 278-279). Mayoral had already obtained the heroin from petitioner by the time Menkiewicz arrived at his house to conclude the sale (Tr. 279-280, 366). In the middle of the transaction they were interrupted by petitioner's arrival (Tr. 280-281). Mayoral assured Menkiewicz that petitioner was "okay," and the transaction was completed in petitioner's presence (Tr. 281-282).[2]

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[1]Mayoral was indicted as a co-defendant with petitioner. He pleaded guilty before trial to conspiracy to possess heroin with intent to distribute it, and to distribute heroin, and testified as a government witness at trial.

[2]The government also alleged (Count IV) that another sale in which petitioner was the ultimate supplier occurred on August 18, 1973, this one between Mayoral and another agent (Tr. 328-331). The jury was unable to reach a verdict on this count.

1. Petitioner contends (Pet. 6-9) that the district court should have ordered the government to identify and produce the informant, James Pickring, who arranged the July 23, 1973, meeting between Mayoral and Officer Menkiewicz. The identity of the informant was disclosed, however, in material the government turned over to petitioner at the outset of trial (Tr. 429-434), and the government's failure to produce the informant was not error.

Officer Menkiewicz and Mayoral testified to the transaction between them, and Mayoral said that he obtained the heroin from petitioner after telephoning him in Menkiewicz's presence. Other government agents who saw Mayoral meet with petitioner when he went to obtain the heroin corroborated Mayoral's testimony. Evidence of petitioner's involvement in the transaction was thus amply provided without need of the informant's testimony, and the government had no duty to produce the informant simply because he witnessed that part of the transaction which occurred between Officer Menkiewicz and Mayoral. See *United States* v. *Tatum*, 496 F.2d 1282 (C.A. 5).

Petitioner does not claim that the informant possessed information which would have exculpated him. Moreover, petitioner was not present when the informant introduced Officer Menkiewicz to Mayoral, or when Mayoral sold the officer the heroin. The informant was not present when Mayoral got the heroin from petitioner. Accordingly, there was no direct contact between petitioner and the informant. Petitioner makes no suggestion whatever as to what testimony the informant conceivably might have given which would have been relevant to his defense, and under these circumstances the government was not obliged to produce him. See *Roviaro* v. *United States*, 353 U.S. 53, 62; *United States* v. *Hodges*, 493 F.2d 11 (C.A. 5).[3]

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[3]Petitioner is in no better position if his argument is read to include the assertion that it was error for the district court to deny his motion for a bill of particulars identifying the government's informant (Pet. 7). Such a motion is committed to the sound discretion of the district court and will be reversed only on a showing of clear abuse. *Joseph* v. *United States*, 343 F.2d 755 (C.A. 5), certiorari denied, 382 U.S. 828. No such abuse can be shown here, since petitioner received before trial all the information about the government's case to which he was conceivably entitled and, moreover, makes no showing that he was surprised at trial by any evidence introduced by the government. See *Williams* v. *United States*, 289 F.2d 598, 601 (C.A. 9).

2. Petitioner claims (Pet. 9-13) that a government witnesses' reference to "mug shots" and "rap sheets" should have resulted in a mistrial.

The government called Agent Henry Braud as a rebuttal witness. He had seen Mayoral and petitioner meet at petitioner's residence on July 23. The following colloquy occurring during his direct testimony (Tr. 553-554):

> Q. What happened after you saw [petitioner] and Daniel Mayoral?
>
> A. As I stopped and lit my cigarette and I glanced over in his direction, the white Defendant [Mayoral], it was like they was engaged in a conversation, and I returned back to my vehicle and then notified that—who he was talking with because I only know [petitioner] from prior investigations and rap sheets and mug shots.
>
> * * * [Here there occurred a bench conference requested by defense counsel.]
>
> Q. Without going into detail, you have reviewed photographs of [petitioner] previously?
>
> A. Yes. I've seen photographs of [petitioner].
>
> Q. Did you rely on these photographs to identify him as being the same person?
>
> A. That's correct.
>
> Q. Had you seen [petitioner] on other occasions other than today?
>
> A. Other than—
>
> Q. The 23rd and today?
>
> A. No, other than—I had seen him on previous investigations, but, like I say, rap sheets and so on and so forth.

At the bench conference the government suggested that the witness' statement could be corrected by a curative instruction. Petitioner's counsel requested, however, that no such instruction be given, and instead after the closing arguments moved for a mistrial on the basis of the witness' testimony. The trial court again offered to give a curative instruction, but again the suggestion was rejected (Tr. 603-604).[4]

The district court is in the most favorable position for determining whether events occurring during the course of trial require the severe remedy of a mistrial, and its ruling on a motion for mistrial will be reversed only because of a clear abuse of discretion. See, *e.g.*, *United States* v. *Faulkenbery*, 472 F.2d 879, 882 (C.A. 9), certiorari denied, 411 U.S. 970. There was no such abuse of discretion here.

The obscure reference to petitioner's possible prior incarceration had not been anticipated by the prosecutor. Opportunity for curative instructions was twice presented and twice refused. Moreover, it has frequently been held that such comments as occurred here, "of a brief and passing nature, inadvertently made," constitute harmless error. *United States* v. *Gocke*, 507 F.2d 820, 822-823 (C.A. 8), certiorari denied, 420 U.S. 979 (reference to defendant's prior confinement in prison). See also *United States* v. *Carter*, 448 F.2d 1245 (C.A. 8), certiorari denied, 405 U.S. 929 (reference to a prison parole card bearing defendant's photograph); *United States* v. *Christian*, 427 F.2d 1299 (C.A. 8), certiorari denied, 400 U.S. 909 (reference to defendant's prior confinement in prison); *United States* v. *Dillinger*, 341 F.2d 696, 699 (C.A. 4) (same). Finally, the evidence of petitioner's guilt

[4]Defense counsel stated, upon making his motion, "We * * * waived the objection when it happened, we merely did not want to call attention to it, therefore, we are not going to ask for an instruction, but we are going to * * * move for a mistrial * * *" (Tr. 603-604). The district court said that it was "perfectly willing to give a corrective charge to the jury * * * but [that it would defer] to [counsel's] wishes not to give one" (Tr. 605).

was substantial. Under these circumstances, the district court did not abuse its discretion in concluding that the witnesses' remarks did not warrant a mistrial. See *Kotteakos* v. *United States*, 328 U.S. 750, 764-765.

3. Petitioner next contends (Pet. 13-16) that he should have been allowed to introduce evidence to show prior conduct inconsistent with the testimony of informant Leonard Martin. Such evidence is properly admitted, however, only when the prior conduct was in fact inconsistent, see, *e.g.*, *Grunewald* v. *United States*, 353 U.S. 391, 418, which was not the case here.

Martin testified that he was a former narcotics addict who was currently enrolled in a methadone treatment program, but that he had not used heroin since 1971 (Tr. 168, 204-205, 213). The evidence petitioner sought to introduce showed that Martin had been arrested in 1973 for possession of heroin. Out of the presence of the jury, James Cambra, the arresting officer, reconstructed the events surrounding Martin's arrest. On the evening of December 9, 1973, Martin and two other men were standing beside an automobile. One of the men (not Martin), on observing an approaching police car, threw a syringe into the automobile (Tr. 441). Cambra suspected that the syringe contained heroin and arrested all three men. A subsequent laboratory analysis of the contents of the syringe failed to reveal any evidence of narcotics (Tr. 442), however, and the charges of illegal possession of narcotics against the three men were dismissed (Tr. 442-443, 446).

Thus, evidence of Martin's arrest on a charge which proved to be unfounded did not amount to a *prima facie* showing of a "real inconsistency" (IIIA Wigmore, Evidence, §1040 (Chadbourn Rev.)) with his testimony that he had not used heroin since 1971, and, accordingly, the trial court properly refused to allow the introduction of the arrest into evidence.

4. Petitioner argues next (Pet. 16-21) that the trial court gave insufficient cautionary instructions regarding the weight to be accorded the testimony of accomplices and informants.

In pertinent part the court instructed (Tr. 609-610):

> An accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of the participation in the crime charged.
>
> On the contrary, the testimony of an accomplice alone, if believe[d] by the jury, may be of such weight to sustain a verdict of guilty even though not corroborated or supported by other evidence.
>
> However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.
>
> The testimony of an informer who provides evidence against a Defendant for pay or for immunity from punishment or for personal advantage or vindication must be considered and weighed by the jury with greater care than the testimony of the ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against the Defendant.
>
> You must also consider whether or not the informer was a drug addict at the time the alleged transaction took place or at the time of trial and whether or not this would have any effect upon his testimony.

This instruction properly apprised the jury of the limitations which attach to the testimony of accomplices and informants. Devitt and Blackmar, *Federal Jury Practice and Instructions*, §§12.02 and 12.04 (1970); *United States* v. *Reid*, 437 F.2d 94 (C.A. 10). Moreover, although there is no precise formulation for the instruction, the court alerted the jury to the additional care that may be required in evaluating the testimony of an informer who is also a narcotics addict. See, *Government of the Virgin Islands* v. *Hendricks*, 476 F.2d 776, 780 (C.A. 3). Although the court did not instruct the jury in the language requested by petitioner (Pet. 16-18), "[o]nce the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *United States* v. *Bayer*, 331 U.S. 532, 536. See also, *United States* v. *Banks*, 485 F.2d 545, 549 (C.A. 5), certiorari denied, 416 U.S. 987.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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